



1 (Proceedings resumed at 10:01 a.m.)

2 THE COURT: Good morning, counsel.

3 Mr. Yarow, on behalf of Mr. Alcorn, you made a  
4 motion for judgment for acquittal, and the Court deferred  
5 ruling on that motion. The Court simply wants to rule on it  
6 at this time.

7 Is there anything else you want to say about your  
8 motion for judgment of acquittal?

9 MR. YAROW: No, sir.

10 THE COURT: All right. We're at the juncture where  
11 all evidence is in in the case, so the Court has a global  
12 view of all of the evidence. The Court finds there is  
13 sufficient evidence to find the defendant guilty, if the jury  
14 deems it appropriate. The Court will deny that motion.

15 MR. YAROW: Yes, Your Honor.

16 THE COURT: Bring the jury in.

17 We're going to be excusing Jurors 4, 5, and 6  
18 because we've already used Alternates 1, 2, and 3 to replace  
19 people who we had to excuse.

20 MS. YUSI: Your Honor, we do that after  
21 instructions; is that right?

22 THE COURT: Do what?

23 MS. YUSI: Do we excuse them after instructions?

24 THE COURT: Oh, yeah, absolutely. We may have to  
25 bring them back before deliberations are over.

1 (The jury entered the courtroom.)

2 THE COURT: Please let the record reflect that this  
3 morning we have all the jurors present.

4 Does counsel agree?

5 MS. YUSI: Government agrees, Your Honor.

6 MR. YAROW: Mr. Alcorn agrees.

7 MS. McCASLIN: Mr. Smith agrees.

8 THE COURT: Good morning, ladies and gentlemen.  
9 We're at the stage where the Court will give you your final  
10 instructions. The instructions the Court will give you, the  
11 Court will read through these instructions, but they are all  
12 indexed, numbered, in capital letters so you can go back on  
13 the index if you think there's some instruction you want to  
14 review.

15 The Court will not have 12 packs of instructions in  
16 there, but the Court will deliver four sets in there of the  
17 same instructions for your use during your deliberations.

18 So let me begin. This will probably take 30, 35  
19 minutes. Who knows?

20 Now that you have heard all of the evidence in the  
21 case, it is my duty to give you the instructions of the Court  
22 concerning the law applicable to this case. It's your duty  
23 as jurors to follow the law as the Court shall state it to  
24 you and to apply the law to the facts as you find them from  
25 the evidence in the case.

1           And counsel may quite properly have referred to some  
2 of the governing rules of law in their arguments. If,  
3 however, any difference appears to you between the law as  
4 stated by counsel and these instructions given to you by the  
5 Court, you, of course, are to be governed by the instructions  
6 as given by the Court.

7           You are not to single out one instruction alone as  
8 completely stating the law but must consider the instructions  
9 as a whole. Neither are you to be concerned with the wisdom  
10 of any rules of law stated by the Court. Regardless of any  
11 opinion you may have as to what the law is or ought to be, it  
12 would be a violation of your sworn duty to base a verdict  
13 upon any view of the law other than that given in the  
14 instructions of the Court, just as it would also be a  
15 violation of your sworn duty as judges of the facts to base a  
16 verdict upon anything other than the evidence in the case.

17           In deciding the facts of the case, you must not be  
18 swayed by sympathy for any party nor bias or prejudice or  
19 favor as to any party. Our system of law does not permit  
20 jurors to be governed by prejudice, sympathy, bias,  
21 guesswork, or speculation.

22           Justice by trial by jury depends upon the  
23 willingness of each individual juror to seek the truth as to  
24 the facts from the same evidence presented to all the jurors  
25 and to arrive at a verdict by applying the same rules of law

1 as given in the instructions of the Court.

2 I instruct you, ladies and gentlemen, that you must  
3 presume the defendants to be innocent of the crimes charged;  
4 thus, the defendants, although accused of a crime in this  
5 indictment, begin the trial with a clean slate, with no  
6 evidence against them -- against him. The indictment as you  
7 already know is not evidence of any kind. The defendants  
8 are, of course, not on trial for any act or crime not  
9 contained in the indictment.

10 The law permits nothing but legal evidence presented  
11 before the jury in court to be considered in support of any  
12 charge against the defendant. The presumption of innocence  
13 alone, therefore, is sufficient to acquit the defendants.

14 The burden is always upon the prosecution to prove  
15 guilt beyond a reasonable doubt. This burden never shifts to  
16 a defendant, for the law never imposes upon a defendant in a  
17 criminal case the burden or duty of calling any witnesses or  
18 producing any evidence. The defendant is not even obligated  
19 to produce any evidence by cross-examining the witnesses for  
20 the government.

21 It is not required that the government prove guilt  
22 beyond all possible doubt. The test is one of reasonable  
23 doubt. Reasonable doubt is a doubt based upon reason and  
24 common sense, the kind of doubt that would make a reasonable  
25 person hesitate to act. Proof beyond a reasonable doubt

1 must, therefore, be proof of such a convincing character that  
2 a reasonable person would not hesitate to rely and act upon  
3 it in the most important of his or her own affairs.

4 Unless the government proves beyond a reasonable  
5 doubt that a defendant has committed each and every element  
6 of an offense charged in the indictment, you must find the  
7 defendant not guilty of the offense. If the jury views the  
8 evidence in the case as reasonably permitting either of two  
9 conclusions, one of innocence, the other of guilt, the jury  
10 must, of course, adopt the conclusion of innocence.

11 Now, a separate crime is charged in each count of  
12 the indictment. Each charge and the evidence pertaining to  
13 it should be considered separately by the jury. The fact  
14 that you may find the defendant guilty or not guilty as to  
15 one of the offenses charged should not control your verdict  
16 as to any other offense charged.

17 Similarly, a separate crime is charged against each  
18 of the defendants in each count of the indictment. The fact  
19 that you find one defendant guilty or not guilty of one of  
20 the offenses charged should not control your verdict as to  
21 any other offense charged against that defendant or against  
22 any other defendant. You must give separate and individual  
23 consideration to each charge, again, against each defendant.

24 Now, the evidence in the case consists of the sworn  
25 testimony of the witnesses, regardless of who may have called

1     them, all exhibits received in evidence, regardless of who  
2     may have produced them, and all facts which have been  
3     admitted or stipulated. Depositions have also been received  
4     in evidence. These contain sworn testimony with counsel for  
5     each party being entitled to ask questions. A deposition may  
6     be accepted by you subject to the same instructions which  
7     apply to the testimony received in court.

8             The statements and arguments of counsel are not  
9     evidence in the case unless made as an admission or  
10    stipulation of fact. When the attorneys on both sides  
11    stipulate or agree as to existence of a fact, however, you  
12    must, unless otherwise instructed, accept the stipulation as  
13    evidence and regard that fact as proved.

14            Any evidence as to which an objection was sustained  
15    by the Court, any evidence ordered stricken by the Court must  
16    be entirely disregarded. Anything you may have seen or heard  
17    outside the courtroom is not evidence and must be entirely  
18    disregarded.

19            You are to consider only the evidence in the case.  
20    In your consideration of evidence, however, you are not  
21    limited to bald statements of the witnesses. In other words,  
22    you are not limited solely to what you see and hear as the  
23    witnesses testify. You are permitted to draw from facts  
24    which you find have been proved such reasonable inferences as  
25    you feel are justified in light of your experiences and

1 common sense.

2           So while you should consider only evidence in the  
3 case, you are permitted to draw some reasonable inferences  
4 from the testimony and exhibits that you feel are justified  
5 in light of common experience. In other words, you may make  
6 deductions, reach conclusions which reason and common sense  
7 lead you to draw from the facts which have been established  
8 by the testimony and evidence in the case.

9           You may also consider either direct or  
10 circumstantial evidence. I gave you this instruction before  
11 trial began. Direct evidence is the testimony of one who  
12 asserts actual knowledge of a fact, such as an eyewitness,  
13 and circumstantial evidence is proof of a chain of facts and  
14 circumstances indicating the existence of a fact. The law  
15 makes no distinction between the weight to be given to either  
16 direct or circumstantial evidence. It requires only that you  
17 weigh all of the evidence and be convinced of the defendant's  
18 guilt beyond a reasonable doubt before he can be convicted.

19           Now, a word about the recordings. Recordings of  
20 conversations have been received in evidence and have been  
21 played for you. Typewritten transcripts of these recorded  
22 conversations have been furnished to you only solely for your  
23 convenience in assisting you in following the conversation or  
24 in identifying the speakers. The tapes themselves, however,  
25 are evidence in the case, and the typewritten transcripts are



1 not evidence. What you hear on the tapes is evidence. What  
2 you read on the transcript is not. If you perceive any  
3 variation between the two, you will be guided solely by the  
4 tapes, not by the transcripts.

5 The Court has just determined that before it reads  
6 an instruction, we're going to give you the caption of the  
7 instruction just in case you need to go back and try to  
8 remember what the Court was reading. I just read instruction  
9 number 6 dealing with recordings and typewritten transcripts.

10 Now instruction number 7, dealing with charts and  
11 summaries. The government has presented evidence in the form  
12 of charts and summaries for the purpose of explaining the  
13 facts that are allegedly contained in the books, the records,  
14 and other documents which are also in evidence in this case.  
15 You should consider these charts and summaries as you would  
16 any other evidence admitted during the trial and give them  
17 such weight or importance, if any, as you feel they deserve.

18 Instruction 8A is titled "Rule 404(b) evidence."

19 You may have heard evidence that the defendant  
20 committed certain acts that may be similar to acts charged in  
21 the indictment. You may not consider this evidence in  
22 deciding if the defendant committed the acts charged in the  
23 indictment. However, you may consider this evidence for  
24 other very limited purposes, such as the following:

25 To prove the defendant had a motive or the

1 opportunity to commit the crimes charged in the indictment;  
2 to prove the defendant had the state of mind or the intent  
3 necessary to commit the crimes charged in the indictment; to  
4 prove the defendant acted accordingly to a plan or in  
5 preparation to commit the crimes charged in the indictment;  
6 to prove that the defendant knew what he was doing when he  
7 committed the crimes charged in the indictment; or to prove  
8 that the defendant did not commit the crime charged in the  
9 indictment by mistake or accident.

10 Do not conclude from this evidence that the  
11 defendant has bad character in general or that because the  
12 defendant may have committed other similar acts, that it is  
13 more likely that he committed the crimes of which he is  
14 currently charged.

15 Instruction number 8 deals with credibility of  
16 witnesses. Now, we had this instruction early on, but I will  
17 repeat it again.

18 You, ladies and gentlemen, as jurors, are the sole  
19 judges of the credibility of the witnesses and the weight, if  
20 any, that their testimony deserves. You may be guided by the  
21 appearance and conduct of a witness or by the manner which a  
22 witness has testified or by the character of the testimony  
23 given or by the evidence to the contrary of the testimony  
24 given.

25 In making your assessment of a witness, you should

1 carefully scrutinize all the testimony given, the  
2 circumstances under which each witness has testified, and  
3 every matter in evidence that tends to show whether that  
4 witness is worthy of belief. Consider each witness's  
5 intelligence, motive to falsify, state of mind, and demeanor  
6 or manner while on the stand. Consider the witness's ability  
7 to observe the matters as to which he or she has testified  
8 and whether he or she impresses you as having an accurate  
9 memory or recollection of these matters.

10 Consider, also, any relation each witness may bear  
11 to either side of the case, the manner in which each witness  
12 might be affected by the verdict, and the extent to which, if  
13 at all, each witness is either supported or contradicted by  
14 other evidence in the case.

15 Now, inconsistencies or discrepancies in the  
16 testimony of witnesses or between the testimony of different  
17 witnesses may or may not cause you as a juror to discredit  
18 such testimony. Two or more persons witnessing an incident  
19 or transaction may see or hear it differently. An innocent  
20 misrepresentation, unlike a failure of recollection, is not  
21 an uncommon experience.

22 In weighing the effect of a discrepancy, always  
23 consider whether it pertains to a matter of importance or an  
24 unimportant detail and whether this discrepancy results from  
25 innocent error or intentional falsehood. After making your

1 own judgment or assessment concerning the believability of a  
2 witness, you are to give the testimony of each witness such  
3 weight, if any, as you think it deserves. You may, in short,  
4 accept or reject the testimony of any witness in whole or in  
5 part.

6 Also, the weight of the evidence is not necessarily  
7 determined by the number of witnesses testifying to the  
8 existence or non-existence of any fact. You may find that a  
9 small -- that the testimony of a small number of witnesses as  
10 to any fact is more credible than the testimony of a larger  
11 number of witnesses to the contrary.

12 Next instruction is number 9, entitled "Uncalled  
13 Witnesses."

14 There are people whose names you have heard during  
15 the trial who did not appear to testify. You should not  
16 speculate as to what those people would have testified to had  
17 they been called. Their actions should not affect your  
18 judgment in any way. You should keep in mind my instruction,  
19 however, that the law does not impose on a defendant the  
20 burden or the duty of calling any witnesses or producing any  
21 evidence. It is the government's burden to prove beyond a  
22 reasonable doubt each element of the crimes charged in the  
23 indictment.

24 Instruction number 10 deals with expert witnesses.  
25 We had at least one expert in here.

1           The Rules of Evidence ordinarily do not permit  
2 witnesses to testify as to their own opinions or their own  
3 conclusions about important questions in a trial. An  
4 exception to this rule exists as to those persons who are  
5 described as expert witnesses. An expert witness is someone  
6 who, by education or by experience, may have become  
7 knowledgeable in some technical, scientific, or very  
8 specialized area.

9           If such knowledge or testimony or experience may be  
10 of assistance to you in understanding some of the evidence or  
11 in determining a fact, an expert witness in that area may  
12 state an opinion as to the matter in which he or she claims  
13 to be an expert.

14           You should consider each expert opinion received in  
15 evidence in this case and give it such weight, if any, as you  
16 think it deserves. You should consider the testimony of  
17 expert witnesses just as you consider other evidence in this  
18 case.

19           If you should decide that the opinion of an expert  
20 witness is not based upon sufficient education or experience  
21 or if you should determine that the reasons given in support  
22 of the opinion are not sound or if you should conclude that  
23 the opinion is outweighed by other evidence, you may  
24 disregard the opinion in part or in its entirety. As I've  
25 told you several times, you, the jury, are the sole judges of

1 the facts in the case.

2 Instruction number 11 deals with witnesses who -- a  
3 witness who has pled guilty to the same or related charges.

4 You have heard evidence that Raeann Gibson and Tony  
5 Sellers pled guilty to charges arising from the events that  
6 are the subject of this trial. You must not consider Raeann  
7 Gibson and Tony Sellers's guilty pleas as any evidence of the  
8 defendants' guilt. Raeann Gibson and Tony Sellers's decision  
9 to plead guilty were personal decisions about their own  
10 guilt. You should disregard Raeann Gibson and Tony Sellers's  
11 guilty pleas completely when considering the defendant's  
12 guilt or innocence. You should give such testimony the  
13 weight you believe it deserves keeping in mind it must be  
14 considered with caution and great care.

15 Now we're back to another credibility of a witness,  
16 instruction number 12, credibility of witnesses who have been  
17 convicted of a felony.

18 The testimony of a witness may be discredited or  
19 impeached by evidence showing that the witness has been  
20 convicted of a felony, a crime for which a person may receive  
21 a prison sentence of more than one year. Prior conviction of  
22 a crime that is a felony is one of the circumstances which  
23 you may consider in determining the credibility of that  
24 witness. It is the sole and exclusive right of the jury to  
25 determine the weight to be given to any prior conviction as

1 impeachment and the weight to be given the testimony of  
2 anyone who has been previously convicted of a felony.

3 Next instruction is entitled "Testimony of  
4 accomplices, informers, and plea agreements."

5 In this case, the government called as witnesses  
6 alleged accomplices with whom the government has entered into  
7 plea agreements providing for the dismissal of some charges.  
8 Such plea bargaining, as it is called, is common and has been  
9 approved as lawful and proper and expressly provided for in  
10 the rules of this Court.

11 An alleged accomplice, including one who has entered  
12 into a plea agreement with the government, does not thereby  
13 become incompetent as a witness. On the contrary, the  
14 testimony of such a witness may alone be sufficient weight to  
15 sustain a verdict of guilty. However, the jury should keep  
16 in mind that such testimony is always received with caution  
17 and weighed with great care.

18 You should never convict a defendant upon  
19 unsupported testimony of an alleged accomplice unless you  
20 believe that testimony beyond a reasonable doubt. And the  
21 fact that an accomplice has entered a plea of guilty to the  
22 offense charged is not evidence in and of itself of the guilt  
23 of any other person.

24 Now we turn to an instruction entitled "Credibility  
25 of witnesses dealing with prior inconsistent statements."

1           The testimony of a witness may be discredited or, as  
2 we sometimes say, impeached by showing that he or she  
3 previously made statements which are different than or  
4 inconsistent with his or her testimony here in court. The  
5 earlier inconsistent or contradicted statements are  
6 admissible only to discredit or impeach the credibility of  
7 the witness and not to establish the truth or the falsity of  
8 these earlier statements made somewhere other than here  
9 during the trial.

10           If you believe any witness has been impeached and  
11 thus discredited, it is your exclusive province to give the  
12 testimony of that witness such credibility, if any, as you  
13 think it deserves. If a witness has shown to have knowingly  
14 testified falsely concerning any important material matter,  
15 you have a right to distrust such witness's testimony  
16 concerning other matters, and you may reject all of the  
17 testimony of that witness or give it such weight or  
18 credibility as you think it deserves.

19           This next instruction deals with the fact of the  
20 defendant's decision not to testify.

21           The defendant in a criminal case has an absolute  
22 right under the Constitution not to testify. The fact that  
23 the defendants did not testify must not be discussed or  
24 considered in any way when deliberating and in arriving at  
25 your verdict. No inference of any kind may be drawn from the



1 fact that a defendant decided to exercise his privilege under  
2 the Constitution and did not testify. As stated before, the  
3 law never imposes upon a defendant in a criminal case the  
4 burden or the duty of calling any witness or producing any  
5 evidence.

6 The term "on or about" is used. Let's define it.  
7 You will note that the indictment charges that the offenses  
8 were committed on or about a certain date. Proof need not  
9 establish with certainty the exact date of the alleged  
10 offense. It is sufficient if the evidence in the case  
11 establishes beyond a reasonable doubt that the offense was  
12 committed on a date reasonably near the date alleged.

13 The approximate amount is used. You will note that  
14 the indictment alleges that an approximate amount of money  
15 was involved in the offenses charged. It is not necessary  
16 for the government to prove the exact or the precise amount  
17 of money alleged in the indictment.

18 Also, the expression "knowingly" is used in the  
19 indictment.

20 The term "knowingly," ladies and gentlemen, as used  
21 in these instructions to describe the alleged state of mind  
22 of the defendants, means that he was conscious and aware of  
23 his action or omission, realized what he was doing or what  
24 was happening around him, and did not act or fail to act  
25 because of ignorance, mistake, or accident.

1           Okay. We will now move over to instruction 20. The  
2 term "willfully" means, as used in these instructions, to  
3 describe the alleged state of mind of the defendant, meaning  
4 that he knowingly performed an act deliberately and  
5 intentionally or on purpose as contrasted with accidentally,  
6 carelessly, or unintentionally.

7           The Court believes it read instruction number 23 on  
8 inconsistent statements.

9           (Pause in the proceedings.)

10          THE COURT: Ladies and gentlemen, we've also had law  
11 enforcement witnesses in this case. You've heard the  
12 testimony of law enforcement officers. The fact that a  
13 witness may be employed as a law enforcement officer does not  
14 mean that his testimony is necessarily deserving of more or  
15 less consideration or greater or lesser weight than that of  
16 an ordinary witness.

17          At the same time, it is quite legitimate for defense  
18 counsel to try to attack the credibility of a law enforcement  
19 witness on the grounds that his testimony may be colored by a  
20 personal or professional interest in the outcome of the case.

21          It is your decision, after reviewing all the  
22 evidence, whether to accept the testimony of the law  
23 enforcement witness and to give that testimony whatever  
24 weight, if any, you think it deserves.

25          Now let's talk about the term "motive." This is

1 instruction number 21 by the Court's count.

2 Intent and motive are different concepts and should  
3 never be confused. Motive, ladies and gentlemen, is what  
4 prompts a person to act or fail to act. Intent refers only  
5 to the state of mind with which the act is done or omitted.  
6 Personal advancement and financial gain, for example, are two  
7 well-recognized motives for much of human conduct. These  
8 motives, however, may prompt one person to voluntary acts of  
9 good while prompting another person to voluntary acts of  
10 crime.

11 Good motive alone is never a defense where the act  
12 done or omitted is a crime. The motive of the defendant is,  
13 therefore, immaterial except insofar as evidence of motive to  
14 aid in the determination of the state of mind or the intent  
15 of the defendant.

16 How do you go about proving intent? Instruction  
17 number 22 deals with proof of intent.

18 The intent of a person or the knowledge that a  
19 person possesses at any given time may not ordinarily be  
20 proved directly because there is no way of scrutinizing the  
21 workings of the human mind. In determining the issue of what  
22 a person knew or what a person intended at a particular time,  
23 you may consider any statements made or acts done or omitted  
24 by that person and all other facts and circumstances received  
25 in evidence which may aid in your determination of that

1 person's knowledge or intent.

2           You may infer, but you are certainly not required to  
3 infer, that a person intends the natural and probable  
4 consequences of acts knowingly done or knowingly omitted.  
5 It's entirely up to you, however, to decide what facts to  
6 find from the evidence received during the trial.

7           Now, you've heard some references to the SEC and  
8 other proceedings. Instruction number 23 deals with the  
9 relationship between violations of civil regulations and  
10 violations of criminal law.

11           Evidence has been received in this case that certain  
12 regulatory statutes may have been violated during the time  
13 alleged in the indictment. All those violations are  
14 regulatory statutes may not be considered by you as a  
15 violation of criminal law. Evidence of violations of civil  
16 statutes may be considered by you as any other evidence in  
17 determining whether the defendant had acquired knowledge and  
18 intent to violate criminal laws.

19           Instruction number 24 is entitled "Good Faith  
20 Defense."

21           Good faith is a complete defense to a charge that  
22 requires intent to defraud. A defendant is not required to  
23 prove good faith. The government must prove intent to  
24 defraud beyond a reasonable doubt. An honestly held opinion  
25 or an honestly formed belief cannot be fraudulent intent even

1 if the opinion or belief is mistaken. Similarly, evidence of  
2 a mistake in judgment and error in management or carelessness  
3 cannot establish fraudulent intent. However, an honest  
4 belief that a business venture would ultimately succeed does  
5 not constitute good faith if the defendant intended to  
6 deceive others by making representations that the defendant  
7 knew to be false or fraudulent.

8           Next instruction deals with deliberate ignorance.  
9 The government may prove that the defendants, David Alcorn  
10 and Aghee William Smith II, acted knowingly by proving beyond  
11 a reasonable doubt that these defendants deliberately closed  
12 their eyes to what would otherwise have been obvious to them.  
13 No one can avoid responsibility for a crime by deliberately  
14 ignoring what is obvious.

15           A finding beyond a reasonable doubt of an intent of  
16 the defendants, David Alcorn and Aghee William Smith II, to  
17 avoid knowledge or enlightenment would permit the jury to  
18 find knowledge. Stated another way, a person's knowledge of  
19 a particular fact may be shown from a deliberate or  
20 intentional ignorance or deliberate or intentional blindness  
21 to the existence of that fact.

22           It is, of course, entirely up to you whether you  
23 find any deliberate ignorance or deliberate closing of eyes  
24 and any inferences to be drawn from any such evidence. You  
25 may not conclude that defendants, David Alcorn and Aghee

1 Smith II, had knowledge, however, from proof of a mistake,  
2 negligence, carelessness, or a belief in an inaccurate  
3 proposition.

4 Instruction number 26 deals with ignorance of the  
5 law. It is not necessary for the prosecution to prove that  
6 the defendants, David Alcorn and Aghee Smith II, knew that a  
7 particular act or failure to act is a violation of law unless  
8 and until outweighed by evidence in the case to the contrary.  
9 The presumption is that every person knows what the law  
10 forbids and what the law requires to be done.

11 The next instruction deals with false exculpatory  
12 statements. Statements knowingly and voluntarily made by a  
13 defendant upon being informed that a crime had been committed  
14 or upon being accused of a criminal charge may be considered  
15 by a jury.

16 When a defendant voluntarily offers an explanation  
17 or voluntarily makes some statement tending to show his  
18 innocence and it is later shown that the defendant knew that  
19 his statement or explanation was false, the jury may consider  
20 this as showing a consciousness of guilt on the part of the  
21 defendant since it is reasonable to infer that an innocent  
22 person does not usually find it necessary to invent or  
23 fabricate an explanation or statement tending to establish  
24 his innocence.

25 Whether or not evidence as to the defendant's

1 explanation or statements point to a consciousness of guilt  
2 on his part and the significance, if any, to be attached to  
3 any such evidence are matters exclusively within the province  
4 of the jury since you are the sole judges of the facts in the  
5 case.

6 In your evaluation of the evidence of an exculpatory  
7 statement shown to be false, you may consider that there may  
8 be reasons fully consistent with innocence that could cause a  
9 person to give a false statement showing that he did not  
10 commit a crime. Fear of law enforcement or reluctance to  
11 become involved and simple mistake may cause a person who has  
12 committed no crime to give such a statement or explanation.

13 The term "aiding and abetting" is used in the  
14 charges in this case. A person may violate the law even  
15 though he or she does not personally do each and every act  
16 constituting the offense if that person aided and abetted the  
17 commission of the offense.

18 Section 2(a) of Title 18 of the United States Code  
19 provides: Whoever commits an offense against the  
20 United States or aids, abets, counsels, commands, induces, or  
21 procures its commission, is punishable as a principal.

22 Before a defendant may be held responsible for  
23 aiding and abetting others in the commission of a crime, it  
24 is necessary that the government prove beyond a reasonable  
25 doubt that the defendant knowingly and deliberately

1 associated himself in some way with the crime charged and  
2 participated in it with the intent to commit the crime.

3 In order to be found guilty of aiding and abetting  
4 the commission of the crimes charged in Counts Seven through  
5 Seventeen, wire fraud, and Count Nineteen, unlawful monetary  
6 transactions, of the indictment, the government must prove  
7 beyond a reasonable doubt that the defendant, one, knew that  
8 the crime charged was to be committed or was being committed;  
9 two, knowingly did some act for the purpose of aiding,  
10 commanding, and encouraging the commission of that crime;  
11 and, three, acted with the intention of causing the crime  
12 charged to be committed.

13 Before the defendant may be found guilty as an aider  
14 or an abettor to the crime, the government must also prove  
15 beyond a reasonable doubt that some person or persons  
16 committed each of the essential elements of the offenses  
17 charged in Counts Seven through Seventeen, wire fraud, and  
18 Count Nineteen, unlawful monetary transactions, of the  
19 indictment.

20 Now, merely being present at the scene of the crime  
21 or merely knowing that a crime is being committed or is about  
22 to be committed is not sufficient for the jury to find that a  
23 defendant aided and abetted the commission of that crime.  
24 The government must prove the defendant knowingly and  
25 deliberately associated himself with the crime in some way as



1 a participant, someone who wanted the crime to be committed,  
2 not as a mere spectator.

3 The next instruction, number 29, is entitled "Proof  
4 May Be Disjunctive."

5 Juror proof may be disjunctive. The Court instructs  
6 the jury that although the indictment may charge the  
7 defendant with committing an offense in several ways using  
8 conjunctive language, that is, "and," it is sufficient if the  
9 government proves the offense in the adjunctive, that is  
10 "or."

11 That is to say, the jury may convict on a unanimous  
12 finding of an element of a conjunctively charged offense.  
13 Therefore, I instruct you that it is not necessary for the  
14 government to prove that the defendant did each of those  
15 things. It's sufficient if the government proves beyond a  
16 reasonable doubt that the defendant did any of these  
17 alternative acts as charged as long as you all agree that the  
18 same particular alternative act was, in fact, committed.

19 Instruction number 30. We now turn to the offenses  
20 charged. When the Court talks about the offenses charged,  
21 you can look in the instructions, and it lays out what's  
22 charged in each count. So we are starting now to go through  
23 the counts.

24 Count One of the indictment charges conspiracy to  
25 commit mail and wire fraud. Counts One and Two charge

1 conspiracy to commit mail and wire fraud.

2 Count One of the indictment charges that from in or  
3 about January 2011 through in or about August 2014, in the  
4 Eastern District of Virginia and elsewhere, Aghee Smith II  
5 and others known and unknown to the grand jury -- unknown --  
6 I'm sorry, others known and unknown knowingly and  
7 intentionally combined, conspired, confederated, and agreed  
8 to commit the following offenses against the United States:

9 Number one, mail fraud. Defendants and others known  
10 and unknown, having devised a scheme and artifice to defraud  
11 and to obtain money and property by means of materially false  
12 or fraudulent pretenses, representations, and promises, did  
13 knowingly place and cause to be placed in any post office and  
14 authorized depository of mail any matter and thing whatever  
15 to be sent and delivered by the Postal Service; did deposit  
16 and cause to be deposited any matter and thing whatever to be  
17 sent and delivered by any private and commercial interstate  
18 carrier and caused to be delivered by mail or such carrier  
19 any matter and thing whatever according to the direction  
20 thereon for the purpose of executing such scheme and  
21 artifice, in violation of Title 18, United States Code,  
22 Section 1341.

23 And two, wire fraud. Defendants and others known  
24 and unknown, having devised a scheme and artifice to defraud  
25 and to obtain money and property by means of materially false

1 and fraudulent pretenses, representations, and promises, did  
2 transmit and cause to be transmitted by means of wire  
3 communications in interstate commerce, writings, signs,  
4 signals, pictures, and sounds for the purpose of execution of  
5 such scheme and artifice, in violation of Title 18, United  
6 States Code, Section 1343.

7 The purpose of the conspiracy was for the  
8 conspirators to personally profit by misleading investors in  
9 material ways about an investment in Dental Support Plus  
10 Franchise, in violation of Title 18, United States Code,  
11 section 1349, 1341, and 1343.

12 Now, Count Two of the indictment charges, from in or  
13 about January '11 through in or about August 2017, in the  
14 Eastern District of Virginia, the defendants, David Alcorn  
15 and Aghee Smith II, and others known and unknown knowingly  
16 and intentionally combined, conspired, confederated, and  
17 agreed to commit the following offenses against the  
18 United States:

19 Number one, mail fraud. Defendants and others known  
20 and unknown, having devised a scheme and artifice to defraud  
21 and obtain money and property by means of materially false  
22 and fraudulent pretenses, representations, and promises, did  
23 knowingly place and cause to be placed in any post office and  
24 authorized depository for mail any matter and thing whatever  
25 to be sent and delivered by the Postal Service, did deposit

1 and cause to be deposited any matter and thing whatever to be  
2 sent and delivered by any private and commercial interstate  
3 carrier and caused to be delivered by mail with such carrier  
4 any matter and thing whatever according to the direction  
5 thereon for the purpose of execution of such scheme and  
6 artifice, in violation of Title 18, United States Code,  
7 Section 1341.

8 And the second objective, mail fraud. Defendants  
9 and others known and unknown, having devised a scheme and  
10 artifice to defraud and to obtain money and property by means  
11 of materially false and fraudulent pretenses,  
12 representations, and promises, did transmit and cause to be  
13 transmitted by means of wire communications in interstate  
14 commerce, writings, signs, signals, pictures, and sounds for  
15 the purpose of executing such scheme and artifice, in  
16 violation of Title 18, United States Code, Section 1343.

17 The purpose of the conspiracy was for the  
18 conspirators to personally profit by misleading investors in  
19 material ways about an investment in cellular spectrum, in  
20 violation of Title 18, United States Code, Section 1349,  
21 1341, and 1343.

22 Now to the statutes defining these offenses.  
23 Title 18 of the United States Code, Chapter 63, Section 1349,  
24 provides in pertinent part the following:

25 Any person who conspires to commit any offense under

1 this chapter shall be subject to the same penalties as though  
2 prescribed for the offense, the commission of which was the  
3 object of the conspiracy.

4 In turn, Title 18, United States Code, Chapter 63,  
5 Section 1341, provides in pertinent part whoever, having  
6 devised or intending to devise any scheme or artifice to  
7 defraud for the purpose of executing such scheme or artifice  
8 places in any post office or authorized depository for mail  
9 any matter and thing whatever to be sent or delivered by the  
10 Postal Service or sent or delivered by any private or  
11 commercial interstate carrier shall be guilty of an offense  
12 against the United States.

13 In turn, Title 18, United States Code, Chapter 63,  
14 Section 1343, provides whoever having devised or intending to  
15 devise any scheme or artifice to defraud transmits or causes  
16 to be transmitted by means of a wire communication in  
17 interstate commerce any writing, signs, signals, sounds,  
18 pictures for the purpose of executing such scheme or artifice  
19 shall be guilty of an offense against the United States.

20 Now, what are the elements? In other words, what  
21 does the government have to prove to prove these two  
22 conspiracy charges? Now, the conspiracy charges are long,  
23 but it's necessary that I go through it.

24 In order to sustain its burden of proof for the  
25 crime of conspiracy as charged in Counts One and Two of the

1 indictment, the government must prove the following three  
2 essential elements beyond a reasonable doubt:

3 First -- this is instruction number 32 -- the  
4 conspiracy, agreement, or understanding to commit mail and  
5 wire fraud as charged in the indictment was formed, reached,  
6 or entered into by two or more persons;

7 Second, that at some time during the existence of  
8 the life of this conspiracy or agreement or understanding,  
9 the defendant you are considering knew the purpose of the  
10 agreement;

11 And, three, that with knowledge of the purpose of  
12 the conspiracy, agreement, or understanding, the defendant  
13 you are considering then deliberately joined the conspiracy,  
14 agreement, or understanding.

15 Now we're going through a whole bunch of definitions  
16 having to do with conspiracy. What is a conspiracy? That's  
17 instruction number 33. I just read 32.

18 A conspiracy, ladies and gentlemen, is a combination  
19 or agreement of two or more persons to join together to  
20 attempt to accomplish some unlawful purpose. It is a kind of  
21 partnership in criminal purposes where each member becomes  
22 the agent of every other member. The essence of the offense  
23 is a combination or mutual agreement by two or more persons  
24 to disobey or disregard the law.

25 The evidence in the case need not show that the

1 alleged members of the conspiracy entered into any express or  
2 formal agreement or that they directly stated between  
3 themselves the details of the scheme and its object or  
4 purpose or the precise means by which the objective purpose  
5 was to be accomplished.

6 Similarly, the evidence in the case need not  
7 establish that all the means or methods set forth in the  
8 indictment were, in fact, agreed upon to carry out the  
9 alleged conspiracy or that all of the means or methods which  
10 were agreed upon were actually used or put into operation;  
11 neither must it be proved that all of the persons charged to  
12 have been members of the conspiracy were such nor that the  
13 alleged conspirators actually succeeded in accomplishing  
14 their unlawful objectives; neither is it necessary for the  
15 government to prove any of the overt acts listed in the  
16 indictment.

17 What the evidence in the case must show beyond a  
18 reasonable doubt is:

19 That two or more persons in some way or manner  
20 positively or tacitly came to a mutual agreement, mutual  
21 understanding to try to accomplish a common unlawful plan as  
22 charged in the indictment; and, number two, that the  
23 defendant you are considering willfully became a member of  
24 such conspiracy.

25 One may become a member of the conspiracy without

1 full knowledge of all the details of the unlawful scheme or  
2 the names and identities of all of the other alleged  
3 conspirators. So if a defendant, with an understanding of  
4 the unlawful character of a plan, knowingly and willfully  
5 joins in an unlawful scheme on one occasion, that is  
6 sufficient to convict him for conspiracy even though he had  
7 not participated at earlier stages in the scheme and even  
8 though he played only a minor part in the conspiracy.

9 Of course, mere presence at the scene of an alleged  
10 transaction or event or mere similarity of conduct among  
11 various persons and the fact that they may have associated  
12 with each other and may have assembled together and discussed  
13 some common names and interest does not necessarily establish  
14 proof of the existence of a conspiracy. Also, a person who  
15 has no knowledge of a conspiracy but who happens to act in a  
16 way which advances some object or purpose of a conspiracy  
17 does not thereby become a conspirator.

18 In your consideration of the conspiracy offense as  
19 alleged in the indictment, you shall first determine from all  
20 of the evidence and all of the testimony in the case whether  
21 or not the conspiracy existed as charged. If you conclude  
22 that a conspiracy did exist as alleged, you should next  
23 determine whether or not the defendant you are considering  
24 willfully became a member of such conspiracy.

25 If and when it does appear beyond a reasonable doubt



1 from the evidence in the case that a conspiracy did exist as  
2 charged and the defendant you are considering was a member,  
3 then the statements and acts knowingly made and done during  
4 such conspiracy and in furtherance of its object by another  
5 proven member of the conspiracy may be considered by the jury  
6 as evidence against the defendant under consideration even  
7 though he was not present to hear the statement made or see  
8 that act done.

9 This is true, ladies and gentlemen, because, as  
10 stated earlier, a conspiracy is a kind of partnership so that  
11 under the law each member is an agent or partner of every  
12 other member, and each member is bound by or responsible for  
13 the acts and the statements of every other member made in  
14 pursuance of their unlawful scheme.

15 We probably have another 30 minutes. We will make  
16 it.

17 Now, we talked about the existence of an agreement.  
18 What does that mean? A criminal conspiracy is an agreement  
19 or a mutual understanding knowingly made or knowingly entered  
20 into by at least two people to violate the law by some joint  
21 or common plan or course of action.

22 A conspiracy is, in a very true sense, a partnership  
23 in crime. A conspiracy or agreement to violate the law, like  
24 any other kind of agreement or understanding, need not be  
25 formal, written, or even expressed directly in every detail.

1 The government must prove that defendants David Alcorn and  
2 Aghee Smith II knowingly and deliberately arrived at an  
3 agreement or understanding that they, and perhaps others,  
4 would violate some law by means of some common plan or course  
5 of action as alleged in Counts One and Two of the indictment.

6 It is proof of this conscious understanding and  
7 deliberate agreement by the alleged members that should be  
8 central to your consideration of the charge of conspiracy.  
9 Unless the government proves beyond a reasonable doubt that a  
10 conspiracy, as just explained, actually existed, then you  
11 must acquit the defendants.

12 The next instruction deals with membership in an  
13 agreement. First, I just read to you in 34 the existence of  
14 an agreement. Now this deals with membership in the  
15 agreement.

16 Before the jury may find the defendants or any other  
17 person became a member of the conspiracy charged in  
18 Counts One and Two of the indictment, the evidence in the  
19 case must show beyond a reasonable doubt that the defendants  
20 knew one or more of the purpose or goals of the agreement or  
21 understanding and deliberately entered into the agreement  
22 intending in some way to accomplish the goal or purpose by  
23 this common plan or joint action.

24 Again, merely associating with others and discussing  
25 common goals, mere similarity of conduct among such persons,

1 merely being present at the place where a crime takes place  
2 or is discussed, or even knowing about the criminal conduct  
3 does not of itself make someone a member of the conspiracy or  
4 a conspirator. However, once it has been shown that a  
5 conspiracy existed, the evidence need only establish a slight  
6 connection between the defendants and the conspiracy.

7 Instruction 36 deals with acts and declarations of  
8 co-conspirators. As I said, these instructions on conspiracy  
9 are repetitive.

10 Evidence has been received in this case that certain  
11 persons, who are alleged in Counts One and Two of the  
12 indictment to be co-conspirators of the defendants and other  
13 unnamed co-conspirators, have done or said things during the  
14 existence or the life of the alleged conspiracy in order to  
15 further or advance its goal. Such acts and statements of  
16 these co-conspirators and other individuals may be considered  
17 by you in determining whether or not the government has  
18 proved the charges in Counts One and Two of the indictment  
19 against the defendants.

20 Since these acts may have been performed and these  
21 statements may have been made outside the presence of the  
22 defendants and even done or said without the defendants'  
23 knowledge, these acts or statements should be examined with  
24 particular care by you before considering them against the  
25 defendants who did not do the particular act or make the

1 particular statement.

2           Acts done or statements made by an alleged  
3 co-conspirator before a defendant joined the conspiracy may  
4 also be considered by you in determining whether the  
5 government has proved -- has sustained its burden of proof in  
6 Counts One and Two of the indictment. Acts done or  
7 statements made before an alleged conspiracy began or after  
8 an alleged conspiracy ended, however, may only be considered  
9 by you regarding the person who performed that act or made  
10 that statement.

11           Instruction 37 is entitled "Agent of the Defendant."  
12 It is not necessary for the government to prove that the  
13 defendants, David Alcorn and Aghee Smith II, personally did  
14 every act constituting the offense charged.

15           As a general rule, whatever any person is legally  
16 capable of doing himself, he can do through another acting as  
17 his agent. So if the acts or conduct of another is  
18 deliberately ordered or directed by a defendant or  
19 deliberately authorized or consented to by a defendant, then  
20 the law holds that defendant responsible for such acts or  
21 conduct just the same as if personally done by him.

22           We turn to instruction number 38 dealing with  
23 "Conspiracy -- Liability for the Substantive Counts." The  
24 substantive counts are the mail fraud and the wire fraud and  
25 unlawful transaction counts.

1           A conspirator is responsible for the offenses  
2 committed by another conspirator if the conspirator was a  
3 member of the conspiracy when the offense was committed and  
4 if the offense was committed in furtherance of or as a  
5 foreseeable consequence of the conspiracy.

6           Therefore, if you have first found the defendant  
7 guilty of the conspiracy charged in Counts One and Two and if  
8 you find beyond a reasonable doubt that during the time the  
9 defendant was a member of that conspiracy, another  
10 conspirator committed the offenses in furtherance of a  
11 foreseeable consequence of that conspiracy, then you may find  
12 the defendant guilty of other charges, even though the  
13 defendant may not have participated in any or all of the acts  
14 which constitute the offenses described in other charges in  
15 the indictment.

16           Instruction 39 is dealing with the success of the  
17 conspiracy.

18           The government is not required to prove that the  
19 parties to or members of the alleged agreement or conspiracy  
20 were successful in achieving any or all of the objects of the  
21 agreement or conspiracy.

22           This next instruction deals with unanimity. Each of  
23 the conspiracy counts of the indictment charged the  
24 defendants with violation of federal law concerning  
25 conspiracy.

1           The indictment alleges a number of separate means or  
2 methods by which the defendants are accused of violating the  
3 law. The government is not required to prove all of the  
4 means or methods alleged in Counts One or Two of the  
5 indictment. Each juror must agree with each of the other  
6 jurors, however, that the same means or methods alleged in a  
7 conspiracy count with an indictment was, in fact, engaged in  
8 or employed by the defendants in committing the crime charged  
9 in the conspiracy counts within the indictment.

10           The jury need not unanimously agree on each means or  
11 method, but in order to convict, you must unanimously agree  
12 upon at least one such means or method as one engaged in by  
13 the defendants. Unless the government has proven the same  
14 means or method to each of you beyond a reasonable doubt, you  
15 must acquit the defendant of the crime charged in each  
16 conspiracy count within the indictment.

17           Did I miss something?

18           MS. YUSI: Your Honor, in the index, and I think in  
19 the original, we have number 37, "Agent," and I don't think  
20 it's in the packet.

21           THE COURT: Number 37 is not in your package?

22           MS. YUSI: I don't believe so. And I don't believe  
23 it was read.

24           THE COURT: I just read number 37.

25           MS. YUSI: I'm sorry. It's the one about "Agent."

1 MR. YAROW: It's 38 in my packet.

2 THE COURT: I have read -- I just read number 37  
3 dealing with agent. I read -- as a matter of fact, I read  
4 them all. I don't know what happened here. We've got some  
5 misnumbering going on here. I read 37 dealing with agent of  
6 the defendant. I read number 38, which was the conspiracy  
7 liability.

8 MS. YUSI: All right. Thank you.

9 THE COURT: Okay. So now I'm moving down to -- I  
10 just read unanimity and explained that, and I'm getting ready  
11 to go to 41. Are we together? 41 is dealing with Counts  
12 Seven through Seventeen. And unless the index has been  
13 changed, that's where we are.

14 (Pause in the proceedings.)

15 THE COURT: We are at 41. 41 is the nature of the  
16 offense charged in Counts Seven through Seventeen. Ladies  
17 and gentlemen, we have these counts laid out in a chart. I'm  
18 going to be reading the beginning language with regard to the  
19 chart.

20 Counts Seven through Seventeen of the indictment  
21 charges that on or about the date set forth below, in the  
22 Eastern District of Virginia and elsewhere, for the purpose  
23 of executing the above-described scheme and artifice to  
24 defraud and for obtaining property by means of materially  
25 false and fraudulent pretenses, representations, and

1 promises, the defendants, David Alcorn and Aghee Smith II,  
2 and those known and unknown knowingly transmitted and caused  
3 to be transmitted by means of wire communication in  
4 interstate commerce certain writings, signs, signals,  
5 pictures, and sounds as follows:

6 In Count Seven, it's laid out here with the date of  
7 the alleged offense and the item that was wired. In  
8 Count Eight -- you can just go right through the counts, the  
9 dates -- the times the defendants allegedly committed the  
10 offense, the date it was allegedly committed, and the wired  
11 item involved is laid out in Counts Seven through Seventeen.  
12 You can track the counts.

13 Now, let's go to the statute defining that offense.  
14 I think I read it when we were talking about the conspiracy,  
15 but now I have to read it again.

16 Section 1343, Title 18, United States Code, provides  
17 in pertinent part that: Whoever, having devised or intending  
18 to devise any scheme or artifice to defraud, or for obtaining  
19 money or property by means of false or fraudulent pretenses,  
20 representations, promises, transmits or causes to be  
21 transmitted by means of a wire communication in interstate  
22 commerce, writings, signs, signals, pictures, or sounds for  
23 the purpose of executing such scheme or artifice, shall be  
24 guilty of an offense against the United States.

25 Instruction number 43 lays out what the



1 United States is required to prove that charge, and after I  
2 read what the United States is required to prove, we're going  
3 to have a breakdown further of what is meant by each of the  
4 things that -- the statements that are made in instruction  
5 43.

6 In order to sustain its burden of proof for the  
7 crime of using a wire communication to further a scheme or  
8 plan to obtain money or property by means of false or  
9 fraudulent pretenses, representations, or promises, as  
10 charged in Counts Seven through Seventeen of the indictment,  
11 the government must prove the following four essential  
12 elements beyond a reasonable doubt:

13 First, the defendant knowingly devised or knowingly  
14 participated in a scheme or artifice to defraud or, B, a  
15 scheme or artifice to obtain money or property by means of  
16 materially false or fraudulent pretenses, representations, or  
17 promises, as detailed in Counts Seven through Seventeen of  
18 the indictment;

19 Second, the scheme and artifice to defraud or the  
20 pretenses, representations, or promises were material, that  
21 is, they would reasonably influence a person to part with  
22 money or property;

23 Third, the defendant did so with intent to defraud;

24 Fourth, in advancement or furthering or carrying out  
25 this scheme to defraud or scheme to obtain money or property

1 by means of false or fraudulent pretenses, representations,  
2 or promises, the defendant transmitted any writings, signals,  
3 or sounds by means of a wire, radio, or television  
4 communication in interstate commerce or caused the  
5 transmission of any writings, signals, or sounds of some kind  
6 by means of wire communications in interstate commerce.

7 Now, we've used the term a number of times, "any  
8 scheme or artifice to defraud." What does all that fancy  
9 term mean? Instruct 44 addresses that.

10 The phrase "any scheme or artifice to defraud" and  
11 "any scheme or artifice for obtaining money or property"  
12 means any deliberate plan or action or course of conduct by  
13 which someone intends to deceive or to cheat another or by  
14 which someone intends to deprive another of something of  
15 value.

16 The term "false or fraudulent pretenses,  
17 representations, or promises" means:

18 A statement or an assertion which concerns a  
19 material or important fact or material or important aspect of  
20 the matter in question and that was even known to be untrue  
21 at the time that it was made or used, that it was made or  
22 used with reckless indifference as to whether it was, in  
23 fact, true or false, and made or used with the intent to  
24 defraud.

25 The term "false or fraudulent pretenses,

1 representations, or promises" includes actual direct false  
2 statements as well as half-truths and includes the knowing  
3 concealment of facts that are material or important to the  
4 matter in question and that were made or used with intent to  
5 defraud.

6 A scheme or artifice to defraud includes a scheme to  
7 deprive another person of tangible as well as intangible  
8 property rights. Intangible rights means anything valued or  
9 considered to be a source of wealth including, for example,  
10 the right to decide how one's money is spent.

11 The term "intent to defraud" means -- "to act with  
12 intent to defraud" means to act knowingly and with the  
13 intention or the purpose to deceive or cheat. An intent to  
14 defraud is accompanied ordinarily by a desire or with a  
15 purpose to bring about some gain or benefit to oneself or  
16 some other person or by a desire or a purpose to cause some  
17 loss to some person.

18 That was instruction 45 dealing with intent to  
19 defraud. I'm moving now to instruction 46 dealing with  
20 materiality.

21 A statement or representation, ladies and gentlemen,  
22 is material if it has a natural tendency to influence or is  
23 capable of influencing a decision or an action. To be  
24 material it's not necessary that the statement or  
25 representation, in fact, influence or deceive. As used in

1 these instructions, a representation, pretense, or promise is  
2 material if it has a natural tendency to influence or is  
3 capable of influencing the decision of the person or entity  
4 to which it is addressed.

5 The government can prove materiality in either of  
6 two ways: First, a representation or promise or pretense is  
7 material if a reasonable person would attach importance to  
8 its existence or nonexistence in determining his or her  
9 choice of action in the transaction in question.

10 A statement could be material even though only an  
11 unreasonable person would rely on it if the person who made  
12 the statement knew or had reason to know his or her victim  
13 was likely to rely on it.

14 In determining materiality, you should consider that  
15 naivety, carelessness, negligence, or stupidity of a victim  
16 does not excuse criminal conduct, if any, on the part of the  
17 defendant.

18 Instruction number 47 deals with the use of wire.  
19 What does that mean?

20 A wire communication includes a wire transfer of  
21 funds between banks in different states, or between a bank  
22 and the United States and a bank in a foreign country. The  
23 government and the defendants have stipulated that the wires  
24 charged in the indictment consisted of interstate wire  
25 transfers of funds between banks in different states.

1           The use of the wire need not itself be a fraudulent  
2 representation. It must, however, further or assist in the  
3 carrying out of the scheme to defraud. It is not necessary  
4 for the defendant to be directly or personally involved in  
5 the wire communications as long as the communication was  
6 reasonably foreseeable in the execution of the alleged scheme  
7 to defraud in which the defendant is accused of  
8 participating.

9           In this regard, it is sufficient to establish this  
10 element of the crime if the evidence justifiably finds that  
11 the defendant caused the wires to be used by others. This  
12 does not mean that the defendant must specifically have  
13 authorized others to transfer the funds. When one does an  
14 act with knowledge that the use of the wires will follow in  
15 the ordinary course of business or where such use of the  
16 wires can reasonably be foreseen, even though not actually  
17 intended, then he causes the wires to be used.

18           The government contends that it was reasonably  
19 foreseeable that the wires would be used in the ordinary  
20 course of business, for example, to transfer the funds  
21 between banks, and therefore, the defendants caused the use  
22 of the wires.

23           The government does not have to prove that the wires  
24 were used on the exact dates charged in the indictment. It  
25 is sufficient if the evidence establishes beyond a reasonable

1 doubt that the wires were used on a date substantially  
2 similar to the dates charged in the indictment.

3 Ladies and gentlemen, we've come to the last count  
4 in the indictment, Count Nineteen, instruction number 48.  
5 We'll follow the usual pattern. First we tell you what the  
6 charge is, then we tell you what the statute is that condemns  
7 that act, and then we tell you what the government has to  
8 prove beyond a reasonable doubt on that particular charge.

9 So we have, I estimate, at least another 15 minutes  
10 or more, maybe 20, but we'll keep on going.

11 Count Nineteen of the indictment charges that on or  
12 about May 1st, 2015, in the Eastern District of Virginia and  
13 elsewhere, the defendant David Alcorn did unlawfully and  
14 knowingly engage and attempt to engage in a monetary  
15 transaction by, through, and to a financial institution,  
16 affecting interstate and foreign commerce, in criminally  
17 derived property of a value greater than \$10,000, such funds  
18 having been derived from a specified unlawful activity, that  
19 is, wire fraud, involving wire transfers from the Eastern  
20 District of Virginia, in violation of Title 18, United States  
21 Code, Section 1343, as follows: depositing a cashier's check  
22 totaling \$100,093.05 into his retirement plan bank account,  
23 in violation of Title 18, United States Code, Section 1957.

24 That's the charge.

25 Instruction 49 is the statute defining the offense

1 charged in Count Nineteen. Section 1957 of Title 18, United  
2 States Code, provides in part, whoever knowingly engages or  
3 attempts to engage in a monetary transaction in criminally  
4 derived property of a value greater than \$10,000 and is  
5 derived from specified unlawful activity shall be guilty of  
6 an offense against the United States.

7 To prove this count -- instruction 50 lays out what  
8 the government has to prove. It has five elements, and then  
9 the Court has to go through and define those five elements.

10 In order to prove the crime of engaging in a  
11 monetary transaction in property derived from specified  
12 unlawful activity -- that's a long way of saying money  
13 laundering -- the government must establish beyond a  
14 reasonable doubt each of the following elements:

15 First, that the defendant engaged or attempted to  
16 engage in a monetary transaction in or affecting interstate  
17 commerce;

18 Two, that the monetary transaction involved  
19 criminally derived property with a value greater than  
20 \$10,000;

21 Third, that the property was derived from specified  
22 unlawful criminal activity;

23 Fourth, the defendant acted knowingly, that is, with  
24 knowledge that the transaction involved proceeds of a  
25 criminal offense;

1           And, fifth, that the transaction took place in the  
2     United States.

3           Now, the first element deals with engaging in a  
4     monetary transaction. What does all that mean? Well, I've  
5     got a page here to explain it to you.

6           The first element that the government must prove  
7     beyond a reasonable doubt is the defendant engaged in a  
8     monetary transaction in or affecting interstate commerce.

9           The term "monetary transaction" means a deposit,  
10    withdraw, transfer, exchange in or affecting interstate or  
11    foreign commerce of funds of a monetary instrument by,  
12    through, or to a financial institution.

13          The term "interstate or foreign commerce" means  
14    commerce between any combination of the states, territories,  
15    or possessions of the United States, or between the  
16    United States and foreign countries.

17          You remember that the government has already  
18    stipulated to the interstate transfer of funds in this case.

19          You must find that the transaction affected  
20    interstate commerce in some way; however minimal. This  
21    effect on interstate commerce can be established in several  
22    ways:

23          First, any monetary transaction with a financial  
24    institution insured by the Federal Deposit Insurance  
25    Corporation or the National Credit Union Share Insurance Fund



1 affects interstate commerce. So if you find that any of the  
2 banks at issue in this case were insured by the FDIC or  
3 NCUSI, that is enough to establish the transaction affected  
4 interstate commerce;

5 Second, if you find that the source of the funds  
6 used in a transaction affected interstate commerce, that is  
7 sufficient as well;

8 Third, if you find that the transaction itself  
9 involved an interstate transfer of funds, that would also be  
10 sufficient.

11 The government and the defendants have stipulated  
12 that the relevant financial institutions were insured by the  
13 FDIC and the NCUSI and the transactions affected interstate  
14 commerce.

15 The second element: Transaction involved criminally  
16 derived property. That's a mouthful. What does that mean?

17 The second element that the government must prove  
18 beyond a reasonable doubt is that the monetary transaction  
19 involved criminally derived property having a value in excess  
20 of \$10,000.

21 The term "criminally derived property" means any  
22 property constituting or derived from proceeds obtained from  
23 a criminal offense.

24 The term "proceeds" means any property derived from  
25 or obtained or retained directly or indirectly through some

1 form of unlawful activity, including the gross receipts of  
2 such activity.

3 The government is not required to prove that all of  
4 the property involved in a transaction was criminally derived  
5 property; however, the government must prove that more than  
6 \$10,000 of the property involved was criminally derived.

7 The third element: Property derived from a  
8 specified unlawful activity. What does that mean?

9 The third element that the government must prove  
10 beyond a reasonable doubt is that the defendant knew that the  
11 property involved in the financial transaction was the  
12 proceeds of some form of unlawful activity.

13 I instruct that this element refers to a requirement  
14 that the defendant knew the property involved in a  
15 transaction represented proceeds from some form, though not  
16 necessarily which form, of activity constituting -- that  
17 constitutes a criminal offense under state or federal law. I  
18 instruct you as a matter of law that wire fraud is a criminal  
19 offense.

20 The fourth element talks about knowledge. You've  
21 had some instructions on knowledge as well, but here's  
22 another one.

23 The fourth element that the government must prove  
24 beyond a reasonable doubt is that the defendant knowingly  
25 engaged in an unlawful monetary transaction as defined above.

1 I instruct you that in a prosecution for an offense  
2 under this section, the government is not required to prove  
3 that the defendant knew the particular offense from which the  
4 criminally derived property was derived; however, the  
5 government must prove beyond a reasonable doubt that the  
6 defendant knew that the transaction involved criminally  
7 derived property, which I remind you means any property  
8 constituting or derived from proceeds obtained from a  
9 criminal offense.

10 If you find that the government has established  
11 beyond a reasonable doubt that the defendant knew that the  
12 transaction involved property derived from a criminal  
13 offense, then this element is satisfied.

14 And the last element is the fifth element, that the  
15 transaction took place in the United States.

16 The fifth element that the government must prove  
17 beyond a reasonable doubt is that the transaction took place  
18 in the United States.

19 I think we've covered part of that already. Now we  
20 get down to our last three instructions.

21 Ladies and gentlemen, I caution you that you are not  
22 here to determine the guilt or innocence of the accused from  
23 the evidence -- I caution you that you are here to determine  
24 the guilt or innocence of the accused from the evidence in  
25 this case. The defendants are not on trial for any act or

1 conduct or offense not alleged in the indictment. Neither  
2 are you called upon to return a verdict as to the guilt or  
3 innocence of any other person or persons not on trial as a  
4 defendant in this case.

5 Also, the punishment provided by law for the  
6 offenses charged in the indictment is a matter exclusively  
7 within the province of the Court or the judge and should  
8 never be considered by a jury in any way in arriving at an  
9 impartial verdict as to the guilt or innocence of those  
10 accused.

11 The Court has permitted you to take notes during the  
12 trial. Your notes should be used only as a memory aid. You  
13 should not give your notes precedent over your independent  
14 recollection of the evidence. If you did not take notes, you  
15 should rely on your own independent recollection of the  
16 proceedings, and you should not be influenced by the notes of  
17 other jurors.

18 I emphasize that the notes are not entitled to any  
19 greater weight than the recollection or impression of each  
20 juror as to what the testimony may have been.

21 And my last instruction:

22 Your verdict must represent the considered judgment  
23 of each juror. In other words, your verdict must be  
24 unanimous on each count. Each of you must decide this case  
25 for yourself but only after an impartial consideration of all

1 the evidence in the case with your fellow jurors.

2 It is your duty as jurors to consult with one  
3 another and deliberate with a view to reach an agreement if  
4 you can do so without violence to your individual judgment.  
5 In the course of your deliberations, do not hesitate to  
6 reexamine your own views and change your opinion if convinced  
7 it is erroneous, but do not surrender your honest conviction  
8 as to the weight or the effect of the evidence solely because  
9 of the opinion of your fellow jurors or for the mere purpose  
10 of returning a verdict.

11 Remember at all times you are not partisans. You  
12 are judges of the facts. You are judges of the facts. Your  
13 sole interest is to seek the truth from the evidence in the  
14 case.

15 Now, upon retiring to the jury room, you should  
16 first select one of your members to serve as your foreperson  
17 who will represent or who will preside over your  
18 deliberations and will be your spokesperson here in court.

19 A special verdict form has been prepared for each of  
20 the defendants in this case. And for your convenience, you  
21 will take the exhibits, which will be sent to the jury room,  
22 and the verdict forms to the jury room, and when you have  
23 reached a unanimous verdict, your foreperson will sign this  
24 verdict form and will let court security officer know that  
25 you have reached your verdict. The court security officer

1 will bring it to the attention of the Court. Remember to  
2 date the verdict sheet and sign it.

3 Now, if during your deliberations you decide you  
4 want to communicate with the Court, your message or question  
5 must be in writing and signed by the foreperson, and it  
6 should be folded. Now, if you leave enough space on the  
7 paper, the Court may be able to answer your question on the  
8 same piece of paper, or it could be that the Court may find  
9 it necessary to bring you back to the courtroom.

10 If you should send a message, do not reveal to the  
11 Court what your division is. The Court does not want to know  
12 who is for what and who is against what. That is your  
13 business.

14 Finally, you should not interpret anything the Court  
15 has said or done over the course of this trial as indicating  
16 what your verdict should be. That is your responsibility and  
17 yours alone.

18 Now, ladies and gentlemen, when we started this  
19 case -- first, let me do this before I do that, just in case  
20 I have to go back.

21 Are there any questions or issues about the charges  
22 as given?

23 MS. YUSI: Not from the government.

24 MR. YAROW: Not from Mr. Alcorn, Your Honor.

25 MS. McCASLIN: Not from Mr. Smith.

1 THE COURT: Okay. Thank you.

2 Ladies and gentlemen, you have been very attentive  
3 during the course of this trial. That's very good for  
4 white-collar fraud case where it's paper, paper, paper. Only  
5 12 of you can deliberate, so the Court must excuse three of  
6 you. Those three excused cannot discuss this case until a  
7 verdict is in, because if something happens to one of the  
8 jurors during deliberations, we will have to call on one of  
9 the three who were excused to come back to deliberate.

10 So do not discuss the case with your family or  
11 friends or do any research or anything. Just hold on. So  
12 you will need to probably call the clerk or check to  
13 determine whether the case is over before you decide that  
14 you're going to discuss this case.

15 So we want to thank the following three jurors for  
16 coming in: [REDACTED].

17 I want to thank you very much for coming in and  
18 giving your time. It was so important that you be here. As  
19 you see, we lost three jurors in the course of this trial, so  
20 that's why we selected an abundance.

21 If you would retire to the jury room and pick up  
22 your materials, you must be departed from the jury room  
23 before I can send your fellow jurors in, so if you would  
24 stand up and depart now.

25 (The alternate jurors were excused.)

1 (Pause in the proceedings.)

2 THE COURT: Ladies and gentlemen, you may depart to  
3 the jury room.

4 (The jury exited the courtroom.)

5 THE COURT: Counsel, you can come up and take a look  
6 at these instructions I just read. It should be the same  
7 thing that you have, but you can come up here and take a  
8 look. Here are the verdict forms that are going back too. I  
9 am sending four copies back, and I'm just saving some time.  
10 We had a little confusion on those pages. It just so happens  
11 we had two Page 23s, but we're straight.

12 (Pause in the proceedings.)

13 THE COURT: We will be sending a clean laptop back  
14 there so if they want to use it to play those exhibits,  
15 they'll have it, and they won't have to come back out and ask  
16 us for a laptop.

17 Have you, counsel, checked the exhibits that are  
18 going back?

19 MS. YUSI: The government is fine with them.

20 MR. YAROW: Mr. Alcorn is fine.

21 THE COURT: Any objection to the exhibits going  
22 back, Ms. McCaslin?

23 MS. McCASLIN: No objections.

24 THE COURT: I'm going to have Ms. Thompson and the  
25 court security officer take them back.



1 (Pause in the proceedings.)

2 THE COURT: They are asking for markers and a board.  
3 We don't need to sit here while they are getting markers and  
4 a board in there.

5 We're going -- when they get their meals, we'll be  
6 able to be out from 1:00 to 2:30. So hopefully the meals  
7 will be in here at 1:00. And we'll be unavailable from 1:00  
8 to 2:30. Otherwise, counsel needs to be close by. I don't  
9 know whether they are going to have questions or not.

10 (Recess from 11:53 a.m. to 2:32 p.m.)

11 THE COURT: Good afternoon. The jury has come back  
12 with a question -- two questions:

13 "Can we have the transcripts of Sunshine Grissom?"

14 Now, I think we told the jurors early on we would  
15 not be providing transcripts from anybody testifying. So the  
16 Court's answer to that would be "No. You must rely on your  
17 recall."

18 Any problems with that?

19 MS. O'BOYLE: No, Your Honor.

20 MS. YUSI: No, Your Honor.

21 MR. YAROW: Not from Mr. Alcorn.

22 MS. McCASLIN: No, Your Honor.

23 THE COURT: That was from Mr. Smith, "no"?

24 MS. McCASLIN: Correct.

25 THE COURT: I'll show you the question because I'm

1 going to mark it.

2 Now, the second question might be a little bit more  
3 problematic.

4 "Does instruction 29 'and/or' apply to the  
5 Count Sixteen?"

6 Instruction 29 is the one that talks about proof may  
7 be disjunctive. If they looked at Count Sixteen, it pertains  
8 to Mr. Alcorn and Mr. Smith, and it says "Interstate  
9 conference call with sales force about DSPF and Janus  
10 Spectrum."

11 The only thing I can figure out is they may very  
12 well find that maybe the call pertained to one or the other  
13 or maybe it pertained to one or the other defendant, but it  
14 may not be both. It may be one; DSPF or it could be Janus  
15 Spectrum.

16 So the question is how do we answer it? "Does  
17 instruction 29 'and/or' apply," and I would be inclined to  
18 answer it: "It may apply as you deem appropriate."

19 MS. YUSI: That's fine with the government, Your  
20 Honor.

21 MR. YAROW: That's fine with Mr. Alcorn, Your Honor.

22 MS. McCASLIN: I'm not entirely clear about what  
23 they're asking can be disjunctive.

24 THE COURT: They are asking if instruction 29,  
25 and/or, applies to Count Sixteen. In other words, may it

1     apply to Count Sixteen?

2             When you look at Count Sixteen, apparently the  
3     government charges that the interstate conference call with  
4     sales force was about DSPF and Janus Spectrum. It could be  
5     "DSPF or," because the instruction says where it's "and," it  
6     could be "or."

7             We can always write back and tell them "We do not  
8     understand your question. Please explain." But I think  
9     that's even worse.

10            You're really not compromising anything if you tell  
11    them the instruction may apply as you deem appropriate, which  
12    means it may not apply.

13            All right. We've got to go one way or the other.

14            MS. McCASLIN: Your Honor, I do think that they're  
15    asking about what the definition and what the jury  
16    instruction means, and so I don't know that we can just leave  
17    it very ambiguous with "It means whatever you want it to  
18    mean," because I think there needs to be a more concrete  
19    answer based on law, if that's what they're asking.

20            THE COURT: The only response to that would be  
21    "Reread the instruction," because the Court would not go any  
22    further than what that instruction says, without committing  
23    error. That's as far as the Court will go, is tell them  
24    "Please reread instruction 29," period, and leave it there.

25            Any objection to that? I don't know how you attempt

1 to go back and explain. I think it would be risky to go back  
2 and start trying to expound upon what that particular  
3 instruction says, but it's very clear in terms of what they  
4 have to do without us trying to inquire further into their  
5 deliberations, which we do not want to do, in order to  
6 answer.

7 So I'm just going to write "Please reread  
8 instruction 29."

9 Take a look at the question. One of you-all step up  
10 and take a look at the question before we send it back there.

11 (Pause in the proceedings.)

12 THE COURT: Okay. Hearing no objection to what the  
13 Court has written, we will send it back there with those  
14 answers.

15 We'll be in recess until further notice.

16 (Recess from 2:39 p.m. to 3:31 p.m.)

17 THE COURT: There's another question from the jury  
18 here, and this question reads as follows:

19 "Exhibit 2000, Section E, paragraph 14, 7/8/14  
20 conference call. Can it be construed that, in fact, Janus  
21 and DSPF were discussed on the sale, or does the stipulation  
22 only mean the call took place within interstate commerce?"

23 And now, the Court's inclined to tell the parties --  
24 to refer them back to the stipulation, back to what a  
25 stipulation is as opposed to just answering that in any other

1 way, but let them understand that when the parties have  
2 stipulated to something, they must accept it as proven,  
3 period, as opposed to getting into debate with them about how  
4 much of it is what, et cetera. So I'm just telling you  
5 that's what I'm thinking here.

6 MR. YAROW: Judge, would you mind repeating the  
7 question?

8 THE COURT: The question was --

9 MR. YAROW: I understand it was a stipulation they  
10 are referring to.

11 THE COURT: "Exhibit 2000, Section E, paragraph 14,  
12 7/8 conference call. Can it be construed that, in fact,  
13 Janus and DSPF were discussed on the sale, or does the  
14 stipulation only mean that it took place in interstate  
15 commerce?"

16 Now, you might want to see what's in the exhibit.  
17 The Section E, the section they're referring to, says this:  
18 Go down to the call they're referring to. It says -- it's  
19 the second from the last stipulation on Page 6 of the  
20 exhibit.

21 "On or about April 7, 2014, the conference call with  
22 sales personnel about DSPF and Janus Spectrum containing  
23 Government's Exhibit 1016A commenced outside of the  
24 Commonwealth of Virginia, traveled through interstate  
25 commerce, and ended in the Eastern District of Virginia."

1           So the stipulation talked about what they discussed  
2 as well as how it traveled, and they are asking us whether  
3 they should construe it as fact that they discussed DSPF and  
4 Janus Spectrum. And my suggestion is they can give them the  
5 definition of the stipulation as opposed to telling them how  
6 they should treat various parts of the stipulation.

7           MR. BOSSE: Your Honor, that is fine by the  
8 government. The instruction number 4 --

9           THE COURT: That's what I'm looking at.

10          MR. BOSSE: -- is what defines it.

11          THE COURT: Instruction number 4 talks about the  
12 stipulation. "When the attorneys on both sides stipulate or  
13 agree as to existence of a fact, however, you must, unless  
14 otherwise instructed, accept the stipulation as evidence and  
15 regard that fact as proved."

16          So refer them to see instruction number 4.

17          Any problems with that, Ms. McCaslin?

18          MS. McCASLIN: No, Your Honor.

19          THE COURT: So we're all in agreement.

20          Okay. Here is the question. You can take that back  
21 to them.

22          We're going to terminate at 5:00. And I think you  
23 can -- I don't think that rushes them in any way, letting  
24 them know we're going to terminate at 5:00. So unless  
25 someone has an objection, that's what we're going to tell

1       them.

2               MR. BOSSE: No objection.

3               MR. YAROW: No objection from Mr. Alcorn.

4               MS. McCASLIN: No objection, Your Honor.

5               THE COURT: Okay. We'll be in recess until the next  
6 question or 5:00, whichever one comes.

7               (Recess from 3:38 p.m. to 4:05 p.m.)

8               THE COURT: The Court understands the jury has a  
9 verdict. Bring them in.

10              (The jury entered the courtroom.)

11              THE COURT: You may be seated.

12              Let the record reflect all jurors are present in the  
13 courtroom.

14              Does counsel concur?

15              MS. YUSI: The government agrees.

16              MR. YAROW: Mr. Alcorn concurs, Your Honor.

17              MS. McCASLIN: Mr. Smith agrees.

18              THE COURT: Okay.

19              THE CLERK: Members of the jury, have you reached a  
20 verdict, and may we have it, please?

21              Mr. Alcorn, will you please stand and face the jury.

22              In the United States District Court for the Eastern  
23 District of Virginia, Norfolk Division, United States of  
24 America vs. David Alcorn, in Criminal Action 2:19cr47, we the  
25 jury find the defendant David Alcorn:

1 Count Two, conspiracy to commit mail and wire fraud,  
2 guilty;

3 Count Seven, wire fraud, guilty;

4 Count Eight, wire fraud, guilty;

5 Count Nine, wire fraud, guilty;

6 Count Ten, wire fraud, guilty;

7 Count Eleven, wire fraud, guilty;

8 Count Twelve, wire fraud, guilty;

9 Count Thirteen, wire fraud, guilty;

10 Count Fourteen, wire fraud, guilty;

11 Count Fifteen, wire fraud, guilty;

12 Count Sixteen, wire fraud, guilty;

13 Count Seventeen, wire fraud, guilty;

14 Count Nineteen, engaging in unlawful monetary  
15 transactions, guilty.

16 Dated February 23, 2022, signed by foreperson, Juror  
17 Number 90.

18 Members of the jury, is this your verdict, so say  
19 you all?

20 (The jury answered in the affirmative.)

21 THE CLERK: Thank you.

22 You may be seated.

23 Mr. Smith, if you would please stand and face the  
24 jury.

25 In the United States District Court for the Eastern



1 District of Virginia, Norfolk Division, United States of  
2 America vs. Aghee William Smith II, in Criminal Action  
3 2:19cr47, we the jury find the defendant Aghee William  
4 Smith II:

5 Count One, conspiracy to commit mail and wire fraud,  
6 guilty;

7 Count Two, conspiracy to commit mail and wire fraud,  
8 guilty;

9 Count Eight, wire fraud, guilty;

10 Count Nine, wire fraud, guilty;

11 Count Sixteen, wire fraud, guilty;

12 Count Seventeen, wire fraud, guilty.

13 Dated February 23, 2022, signed foreperson, Juror  
14 Number 90.

15 Members of the jury, is this your verdict, so say  
16 you all?

17 (The jury answered in the affirmative.)

18 THE CLERK: Thank you.

19 THE COURT: You may be seated.

20 Okay, ladies and gentlemen. We want to thank you  
21 for your service --

22 MS. McCASLIN: Your Honor, we would make a motion to  
23 poll the jury, please.

24 THE COURT: I was waiting for it. I didn't hear  
25 anything. All right. You may poll the jury on behalf of

1 Mr. Smith.

2 MR. YAROW: Mr. Alcorn, too, please, Your Honor.

3 THE COURT: And Mr. Alcorn. So take them one by  
4 one. You can just ask them whether this is their verdict  
5 instead of going through every count all over again.

6 THE CLERK: Yes, sir.

7 As to David Alcorn, Juror Number 7, is this your  
8 verdict?

9 THE JUROR: Yes.

10 THE CLERK: Juror Number 26, is this your verdict?

11 THE JUROR: Yes.

12 THE CLERK: Juror Number 38, is this your verdict?

13 THE JUROR: Yes.

14 THE CLERK: Juror Number 43, is this your verdict?

15 THE JUROR: Yes.

16 THE CLERK: Juror Number 84, is this your verdict?

17 THE JUROR: Yes.

18 THE CLERK: Juror Number 87, is this your verdict?

19 THE JUROR: Yes.

20 THE CLERK: Juror Number 90, is this your verdict?

21 THE JUROR: Yes.

22 THE CLERK: Juror Number 99, is this your verdict?

23 I believe we had two parties answer for Juror  
24 Number 90.

25 Juror Number 90, is this your verdict?

1 THE JUROR: Yes.

2 THE CLERK: Juror Number 99, is this your verdict?

3 THE JUROR: Yes.

4 THE CLERK: Juror Number 101, is this your verdict?

5 THE JUROR: Yes.

6 THE CLERK: Juror Number 112, is this your verdict?

7 THE JUROR: Yes.

8 THE CLERK: Juror Number 136, is this your verdict?

9 THE JUROR: Yes.

10 THE CLERK: Juror Number 140, is this your verdict?

11 THE JUROR: Yes.

12 THE CLERK: All have answered in the affirmative,  
13 Your Honor.

14 As to Mr. Smith, Juror Number 7, is this your  
15 verdict?

16 THE JUROR: Yes.

17 THE CLERK: Juror Number 26, is this your verdict?

18 THE JUROR: Yes.

19 THE CLERK: Juror Number 38, is this your verdict?

20 THE JUROR: Yes.

21 THE CLERK: Juror Number 43, is this your verdict?

22 THE JUROR: Yes.

23 THE CLERK: Juror Number 84, is this your verdict?

24 THE JUROR: Yes.

25 THE CLERK: Juror Number 87, is this your verdict?

1 THE JUROR: Yes.

2 THE CLERK: Juror Number 90, is this your verdict?

3 THE JUROR: Yes.

4 THE CLERK: Juror Number 99, is this your verdict?

5 THE JUROR: Yes.

6 THE CLERK: Juror Number 101, is this your verdict?

7 THE JUROR: Yes.

8 THE CLERK: Juror Number 112, is this your verdict?

9 THE JUROR: Yes.

10 THE CLERK: Juror Number 136, is this your verdict?

11 THE JUROR: Yes.

12 THE CLERK: Juror Number 140, is this your verdict?

13 THE JUROR: Yes.

14 THE CLERK: All have answered in the affirmative,  
15 Your Honor.

16 THE COURT: Okay. Ladies and gentlemen, thank you  
17 for your service. We know it's been a sacrifice. But for  
18 you, we could not have a jury trial.

19 By the way, they don't have jury trials in Russia,  
20 while we're talking about Russia this day. They do something  
21 else that I will not explain to you.

22 At any rate, if you will return to the jury room and  
23 just wait, we will momentarily dismiss you.

24 (The jury exited the courtroom.)

25 THE COURT: We will be in recess for about ten

1 minutes, and then we'll come back and entertain any motions.

2 MS. YUSI: Your Honor, one thing before the  
3 dismissal of the jury. We have a forfeiture issue with  
4 Mr. Alcorn. I believe he's prepared to waive jury findings  
5 regarding forfeiture, but I just want to get that before they  
6 are dismissed.

7 THE COURT: Fine. You may all have a seat.

8 Mr. Yarow, where are we on that issue?

9 MR. YAROW: We're prepared to waive the jury  
10 findings on the forfeiture.

11 THE COURT: You've consulted with Mr. Alcorn?

12 MR. YAROW: I have, Your Honor.

13 THE COURT: Okay.

14 MS. YUSI: Thank you.

15 THE COURT: Anything with respect to Mr. Smith?

16 MS. YUSI: No, Your Honor.

17 THE COURT: Then we will take the ten-minute break,  
18 and we'll be back to address other matters.

19 (Recess from 4:15 p.m. to 4:26 p.m.)

20 THE COURT: The Court has a Sentencing Procedures  
21 Order here for Mr. Alcorn. Let's see. All the parties have  
22 signed this.

23 Mr. Alcorn, you are directed to be present on  
24 June 23, 2022, at 2:00 p.m. here in Norfolk. That order will  
25 be entered.

1           The Court also has a Sentencing Procedures Order on  
2 Mr. Smith. You are directed to be present 11:00 a.m. on the  
3 23rd of June.

4           Any motions that you want to make, you can certainly  
5 make them, or you can put them in writing or whatever your  
6 option may be that you want to exercise.

7           MR. YAROW: Your Honor, I have a motion for  
8 Mr. Alcorn to be allowed to remain on pretrial release  
9 pending his sentencing. He has been, over the last almost  
10 three years now, an extraordinarily cooperative client. We  
11 have maintained at least weekly telephone contact.

12           He would be willing to come back to the Eastern  
13 District of Virginia. He would ask to be allowed to go back  
14 to Phoenix, Arizona, where he lives, where he's been on  
15 pretrial supervision his entire almost three years, and he  
16 would be prepared to come back here for his sentencing. He's  
17 on medication. He has medication at his hotel.

18           THE COURT: Well, the Court believes -- well, let's  
19 see what the United States' position is.

20           MS. O'BOYLE: Your Honor, the government objects to  
21 that request. We would move to revoke Mr. Alcorn's bond  
22 under 3143(a). This defendant has now been convicted of  
23 every count that he was charged with in the indictment. The  
24 circumstances have completely changed from his pretrial  
25 supervision when he was initially indicted.

1           His guidelines -- his advisory guideline range  
2 because of the loss amounts in this case and the substantial  
3 financial hardship to the victims -- there's going to be 25  
4 or more. He's going to get a number of enhancements. His  
5 guidelines are going to be very, very high, possibly as high  
6 as 360 to life.

7           The government would also note that in the records  
8 in trial, there have been plenty of evidence of an unindicted  
9 co-conspirator who assisted Mr. Alcorn in moving a lot of --  
10 funneling fraud proceeds into companies that were in his  
11 name. That individual is still out there and could -- was  
12 certainly willing to assist Mr. Alcorn in hiding assets in  
13 connection with the Securities and Exchange Commission suit.

14           And while the government did do a lot of tracing in  
15 this case, there is money -- there is cash that obviously is  
16 fungible that the government cannot trace, and so we have no  
17 way of knowing exactly how much cash is out there or how much  
18 money -- whether he has friends who are going to be willing  
19 to assist him.

20           We have no confidence that at this stage, given the  
21 guideline range that he is facing, that he will report, and  
22 the burden -- or the standard has shifted. At this point, he  
23 is to be detained unless the Court finds by clear and  
24 convincing evidence that he is not likely to flee.

25           And so at this point, Your Honor, the government

1 believes that his bond should be revoked and that he should  
2 be detained pending sentencing.

3 THE COURT: The Court had looked at Section 3143(a)  
4 before it came in here, knowing that it would be faced with  
5 this particular issue. And the Court understands that it  
6 must detain this defendant, given the gravity of the charges  
7 he's convicted on and the length of the sentence that he's  
8 facing. He's facing a minimum of 292 to 365 months'  
9 incarceration, even under the best circumstances calculating  
10 the guideline.

11 Moreover, the Court cannot make a finding by clear  
12 and convincing evidence that this defendant is not likely to  
13 flee. This defendant has shown an extensive pattern of  
14 dishonesty and ignoring law enforcement and regulatory  
15 agencies. In the face of being advised that what he was  
16 doing was wrong, he still persisted in his conduct. The  
17 Court also is concerned about the whereabouts of a lot of the  
18 money discussed in this case. The Court does not know where  
19 it is.

20 The Court cannot trust the defendant to return here  
21 and does not believe that he's not a flight risk. There's no  
22 evidence to show by clear and convincing evidence that he is  
23 not likely to flee. As a matter of fact, the evidence would  
24 probably show otherwise given his pattern of conduct as  
25 demonstrated in this trial.



1           So that motion is denied. You will be remanded to  
2 the custody of the United States Marshal at the end of this  
3 hearing.

4           Is there another motion for Mr. Smith?

5           MS. McCASLIN: There is, Your Honor. Under 3143, we  
6 are also asking that Mr. Smith remain out on bond pending  
7 sentencing. Of course it is a clear-and-convincing standard;  
8 however, Mr. Smith has been out on bond for three years as  
9 well. He has had no violations. He has lived in the same  
10 home in California for 21 years with his wife. He has six  
11 children, 11 grandchildren, all around the California area.

12           He has appeared in court every day this month, of  
13 course, staying at the hotel. He has never -- he did not  
14 flee in any way. He actually flew out here in November, just  
15 before we were supposed to go to trial then. That trial, of  
16 course, got continued when a co-defendant tested positive for  
17 COVID. But Bill came out here prepared to go to trial in  
18 November, and he was here again, of course, for this trial.

19           On top of that, Your Honor, he is not a danger. He  
20 has completely left the financial world, as you heard during  
21 the trial. Mr. Smith is 70 years old. He does have health  
22 issues, including multiple heart medications, and those risk  
23 factors are also a problem with COVID-19. Mr. Smith is not  
24 vaccinated. He has not had COVID-19 because he's been very  
25 careful and primarily stays at home, but the jail is going to

1 be very dangerous for Mr. Smith. Mr. Smith did not perjure  
2 himself.

3 And there is a disparity here as well. Tony Sellers  
4 and Tom Barnett both were able to stay out on bond pending  
5 sentencing. Tony Sellers also got a delayed reporting. And  
6 I would note that in this case, Tony Sellers denied part of  
7 the Statement of Facts. Billy Seabolt also went to trial and  
8 also remained out on bond.

9 Your Honor, the legal standard under 3143 does not  
10 change depending on whether a person pleads guilty or  
11 exercises their right to go to trial. Mr. Smith exercised  
12 his constitutional right, and his bond should not be revoked  
13 at this time when he is not a danger, he's not a flight risk,  
14 he always comes.

15 THE COURT: Does the United States wish to make any  
16 response?

17 MS. O'BOYLE: Your Honor, yes, we do. We do believe  
18 that this defendant's bond should be revoked for many of the  
19 same reasons that we outlined for Mr. Alcorn.

20 To address, first, the difference between  
21 Mr. Sellers, Mr. Barnett, and Mr. Smith, Mr. Sellers and  
22 Mr. Barnett came into this Court and accepted responsibility  
23 for the crime that they committed. They are on bond because  
24 they accepted that responsibility.

25 Mr. Smith, on the other hand, the government does

1 not penalize him for exercising his right to trial. He  
2 absolutely had that right. But the jury at this point has  
3 convicted him, and this is a defendant who has accused the  
4 government of having a conspiracy against him. In the  
5 bankruptcy deposition that the Court heard at trial, he  
6 believed, under oath, that he is in this situation because of  
7 criminals in government.

8 And so under those circumstances, Your Honor, this  
9 is not someone who we believe is going to show up here for  
10 sentencing when he believes that he is the victim of some  
11 vast governmental conspiracy.

12 He has not accepted responsibility in this case.  
13 His guidelines, also, like Mr. Alcorn's, are extremely high.  
14 His loss amount is even higher than Mr. Alcorn's because he  
15 has losses related to both dental as well as spectrum.

16 And given that this defendant has not shown any  
17 level of acceptance of responsibility at all and the level of  
18 deceit and deception that was displayed over seven years of  
19 course of conduct in this case, we believe that this  
20 defendant also should be detained pending sentencing.

21 MS. McCASLIN: Your Honor, may I respond briefly?

22 THE COURT: Briefly.

23 MS. McCASLIN: The legal standard does not change in  
24 3143 based on whether somebody accepts responsibility or  
25 doesn't. And while I do not have full information on this, I

1 have doubts about whether all of these defendants who pled  
2 guilty truly accepted responsibility in their debrief.

3 Mr. Smith chose to go to trial, but that is not a  
4 consideration in the law. And Mr. Smith has a very stable  
5 home life with his wife, with his children, with his  
6 grandchildren. He is not a flight risk. He is a good person  
7 to remain on bond. He will come back in three months for  
8 sentencing. And obviously he would stay in contact with me,  
9 Mr. Grindrod, and our office.

10 THE COURT: Well, you're right about the standard.  
11 The standard doesn't require that he accept responsibility,  
12 but there's a multiplicity of factors that the Court has to  
13 weigh in making the determination whether it should release  
14 Mr. Smith pending sentencing, and we start with the fact that  
15 the Court is required to detain him unless the judicial  
16 officer finds by clear and convincing evidence that the  
17 person is not likely to flee.

18 The Court has heard the argument of counsel, but  
19 there's nothing clear and convincing about that. Mr. Smith  
20 has been convicted now by a jury for his criminal conduct,  
21 which lasted over seven years. The Court has to take into  
22 consideration his state of mind and his general posture with  
23 respect to these offenses.

24 Mr. Smith evidenced an indifference to the law. The  
25 Court believes after watching the case, listening at the

1 evidence, that he has no respect for the law, that he will do  
2 what he wants to do, and that tells the Court that when he's  
3 facing as much time as he is, the Court cannot trust that he  
4 will look at his family, and et cetera, and decide that he's  
5 not going to flee. The Court cannot make that determination.  
6 The Court does not see any remorse on behalf of Mr. Smith.

7 The fact that he's not vaccinated, the Court  
8 considers that, but the prison will have to cope with the  
9 fact that he's not vaccinated. They have other people who  
10 are unvaccinated that come in this court from time to time  
11 for guilty pleas or other proceedings, so they know how to  
12 handle that.

13 With respect to his medical condition. They have  
14 the capacity to deal with that, so those are not reasons to  
15 suggest he should be released. On the other hand, the Court  
16 believes that the evidence is overwhelming in this case of  
17 his guilt and his tendency to engage in dishonesty.

18 He has no credibility with this Court, so the Court  
19 cannot find by clear and convincing evidence that he will not  
20 flee. Accordingly, his bond is revoked, and he is remanded  
21 to the custody of the United States Marshal upon the  
22 conclusion of these proceedings.

23 MS. McCASLIN: Your Honor, would the Court consider  
24 a one-day delay so that Mr. Smith can get his medication from  
25 the hotel and bring them to the marshals with him for the

1 jail?

2 THE COURT: No.

3 MS. McCASLIN: Thank you.

4 THE COURT: Someone else will have to go over there,  
5 counsel -- maybe you -- and get his things, but the Court is  
6 not releasing Mr. Smith anyplace except to the custody of the  
7 United States Marshal. Now, this is not an unusual  
8 situation, to have someone else step in and take care of  
9 certain things, but the Court is not going to do a one-day  
10 release.

11 Anything else?

12 MS. McCASLIN: No, Your Honor.

13 MS. O'BOYLE: Not from the government, Your Honor.  
14 Thank you.

15 THE COURT: Then the Court will be in recess until  
16 further notice.

17 (Proceedings concluded at 4:39 p.m.)

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CERTIFICATION

I certify that the foregoing is a correct transcript  
from the record of proceedings in the above-entitled matter.

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

Carol L. Naughton

August 30, 2022

Carol L. Naughton, Official Court Reporter